

Town of Amherst
Zoning Board of Appeals - Special Permit
DECISION

Applicant and Owner: Howard Ewert, 284 North Pleasant Street, Amherst, MA 01002

Date Application filed with the Town Clerk: May 26, 2006

Nature of request: Petitioner seeks to Appeal a Decision of the Building Commissioner under Section 10.1 of the Zoning Bylaw and 1) to confirm that the Zoning Board does not adjudicate property rights; 2) to confirm that zoning enforcement does not extend beyond the provisions of the Zoning Bylaw and the provisions of the applicable zoning permit; 3) to confirm that the parking configuration shown on the plan being enforced no longer reflects the actual situation on the ground.

Location of property: 63-65 North Prospect Street
Map 11C, Parcel 218, R-G Zone

Legal notice: Published in the Daily Hampshire Gazette on July 4 and July 11, 2006, and sent to abutters on June 30, 2006.

Board members: Thomas Simpson, Russell Frank and Jane Ashby

Submissions:

The applicant submitted the following documents:

- A letter dated May 31, 2006, from Howard Ewert requesting that the hearing for the Appeal be delayed until after the decision for a related Special Permit application;
- A plan entitled "Proposed Landscaping Plan", approved by the Zoning Board of Appeals on October 3, 1996;
- A letter dated March 8, 2006, from an anonymous sender to the Building Inspector, expressing concern about parking, erosion and the maple tree at 63-65 North Prospect Street;
- A letter dated May 3, 2006, from Bonita Weeks, Building Commissioner, to Howard Ewert, constituting a Notice of Violation and a Cease and Desist Order for parking violations at 63-65 North Prospect Street;
- A copy of M.G.L.A. Chapter 40A, Section 15, describing Appeals to the Permit Granting Authority.

Town staff submitted the following documents:

- A copy of the ZBA FY97-0018 Special Permit with the parking plan approved by the Board on October 3, 1996;
- A memorandum from the Fire Department, Assistant Fire Chief Michael Zlogar, dated July 11, 2006, commenting on the application;
- An Email from Michael Zlogar, dated July 17, 2006, commenting on the width of the driveway and correcting a comment made in the memorandum dated July 11, 2006;

Site Visit: July 18, 2006

At the site visit the Board was met by Howard and Barbara Ewert. The Board observed the following:

- The location of the lot on a quiet, tree-lined side street near the center of town, surrounded by older multi-family and single-family homes and institutional buildings;
- The two existing wood-framed houses on the property;
- The gravel parking lot and large maple tree on the south side of the house;
- The approximate location of the property line on the south side of the property which intersects the existing maple tree about 1/3 into the tree trunk;
- The location of the barn associated with the adjacent property to the south;
- The approximate location of the rear property line, marked by the tall trees at the northeast corner of the lot.

Public Hearing: July 18, 2006.

Mr. Simpson, chair of the Board, stated that he planned to open the hearing, take some testimony and then continue the hearing because of the relationship of this Appeal to a Special Permit application which the Board would be hearing later in the evening.

At the public hearing, Howard Ewert and his attorney, Michael Pill, presented the petition. Mr. Pill stated that, if the Special Permit application is resolved to the satisfaction of the applicant, then the Appeal will be moot.

Mr. Simpson asked the applicant to explain why the old plan (approved on October 3, 1996, as part of Special Permit ZBA FY97-0018) cannot be used. He asked what was wrong with the old plan.

Mr. Pill responded by reading the first item of the Appeal, stating that the complaint on which the Building Commissioner acted was anonymous and quoted from the letter of complaint. He noted that there is a difference between property rights and zoning and that the neighbors have no easement or rights over Howard Ewert's property. He stated that the application for Special Permit ZBA FY2006-00049 acknowledges that there is a legitimate problem with the parking lot.

Mr. Simpson inquired about the Cease and Desist Order and about Item #3 of the Appeal which states that the parking plan no longer reflects present conditions. He asked for an explanation of why the parking plan should not be enforced.

Mr. Ewert explained that there had been a parking spot in a garage that had existed behind building #65. One car was supposed to park in the garage. The parking plan cannot be enforced because the garage is no longer there. It was taken down under a building permit that included an addition to the house at #65. Therefore the parking plan is no longer valid. He went on to give the sequence of events.

- April 23, 1996 – A Building Permit authorized removal of the garage, among other things.
- August, 1996 – The property was sold.
- October, 1996 – Special Permit ZBA FY97-0018 was issued and the parking plan was accepted by the Zoning Board of Appeals. This parking plan showed the garage that had received authorization to be removed.

The applicant stated 1) that the parking plan is impossible to enforce and 2) that the Fire Department, in its memorandum, made negative comments about the old plan and that they never reviewed the new plan that was submitted as part of ZBA FY2006-00049. (It should be noted that the Fire Department did comment later on the proposed parking plan on July 11th & 17th, 2006.)

Mr. Simpson asked what is in the spot where the garage is now. The applicant explained that Building Permit #96-483 authorized the construction of an addition to the house at #65.

Bonnie Weeks, Building Commissioner, stated that the Building Permit #96-483 was issued to the former owner. State law does not permit the issuance of a Building Permit to someone other than the one who applies for it. Therefore the former owner took responsibility for the permit.

Ann Sterling Bush, 57 North Prospect Street, spoke about the application. She stated that she was the person who had written the letter to the Building Inspector and she described the activities that had occurred next door that were beyond those permitted by the Special Permit. She described problems with too many cars parking on the lot and too much noise. She described what used to be a 15-foot wide strip of lawn area that separated her property from the Ewert's parking lot, immediately to the north of her property. She stated that cars are currently being parked there causing problems with compaction, mud, slush and ruts along this strip. She stated that the property is currently being rented and that each unit is required to have 2 parking spaces. She urged the Board to limit the applicant to 6 parking spaces, 2 for each of the 3 units. She stated that parking is not being done in the pattern described on the plan approved by the Board in October of 1996 and that there are almost twice as many cars being parked on the site as the number required by the Zoning Bylaw.

Ms. Ashby MOVED to continue the evidentiary portion of the public hearing to Monday, August 21, 2006, at 7:30 p.m. Russ Frank SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing – August 21, 2006

Michael Pill, attorney for the petitioner, began the hearing by stating that Mr. Ewert wished to withdraw his appeal of the Building Commissioner's Cease and Desist order.

Mr. Simpson asked Ms. Weeks, Building Commissioner to describe the sequence of events around the Cease and Desist order.

Ms. Weeks stated that she received several complaints of excessive parking on Mr. Ewert's property. She visited the site, and found the parking configuration did not match the approved plans of the ZBA FY97-0018 Special Permit. Specifically, there were too many cars on the property, there was no garage, and the 15-foot buffer zone at the southern border of the property no longer existed.

Ms. Weeks said that she wrote a letter to Mr. Ewert to serve as a Notice of Violation of Condition #3 of the FY97 Special Permit. In the letter she gave Mr. Ewert two options – to file for a modified parking plan to the ZBA or to conform to the approved parking plan of the FY97 Special Permit. Mr. Ewert had the option to do either, she said. Ms. Weeks also gave Mr. Ewert the option to appeal the Cease and Desist Order, which he is doing in this case.

In analyzing the situation, Mr. Simpson said that, given the conversation at the ZBA FY2006-00049 hearing earlier in the evening, if the applicant doesn't file the FY2006-00049 Special Permit, the newly approved parking plan will be inoperative.

If the FY2006-00049 Special Permit is not filed, the parking plan for the FY97-0018 Special Permit would still remain as the parking configuration that Mr. Ewert must follow. That is, if the Board does not vote to uphold the Building Commissioner's ruling, nothing will have been accomplished.

Therefore, given Mr. Simpson's reasoning, the Board should vote not to accept the withdrawal request, and to uphold the Building Commissioner's Cease and Desist ruling.

Ms. Ashby stated that she was concerned about statement #3 on the Appeal's application – "that the parking configuration shown on the (FY97) plan being enforced no longer reflects the actual situation at the property." This statement is true, she said, because there is no longer a garage available. The applicant is not adhering to the parking plan currently on file and is in violation of his permit.

Mr. Pill said that he agrees with Ms. Ashby's statement that the FY97 plan does not reflect the situation at the property.

The abutter to the south, Ann Stirling Bush, stated that the Building Commissioner had acted to uphold the Zoning Bylaw. The FY97 parking plan required a 15-foot buffer between Ewert's parking and her property. Section 11.3 of the Bylaw states that landscaping on private parking areas must be maintained, and Mr. Ewert has not done this.

In addition, Ms. Stirling-Bush stated that Section 7.112 of the Bylaw requires that parking areas with 5 or more spaces must have effective screening of the parking from adjacent streets or properties. She said that Mr. Ewert already was in violation of the previous parking plan in three ways, not including the violations of the above two sections of the Bylaw. When will this problem ever end, she asked.

The fine is \$100 per day if violations are not corrected. Ms. Stirling Bush noted that if the FY2006-00049 Special Permit is not filed, or this Appeal is withdrawn, the Cease and Desist order stands, and the fines start to kick in.

The zoning staff assistant asked if the Board should address the three statements that the applicant made on the Appeal application – 1) that the Board does not adjudicate property rights, 2) that zoning enforcement does not extend beyond provisions of the zoning bylaw, and 3) that the parking configuration on the FY97 plan no longer reflects the actual situation.

Mr. Pill stated that he added those statements to send a message to the neighbors about the role of the ZBA process, and because his client wanted to avoid receiving the fines.

Mr. Pill further said that his client now wants to withdraw his request to withdraw the Appeal.

Ms. Ashby said that the Board has the option to continue the hearing as well. She would like a legal opinion about the consequences of withdrawing the Appeal.

Mr. Frank said that, in his opinion, the Board should deny the Appeal, and vote to uphold the Building Commissioner's action.

Mr. Frank moved to close the evidentiary portion of the hearing. Mr. Simpson seconded the motion, and the vote was unanimous.

Public Meeting – Discussion

Mr. Pill asked to be recognized; he said that the applicant waives any objection to the Board's denial of his Appeal and affirmation of the Building Commissioner's findings. He also asked to waive any request for "findings" related to the Board's decision and to waive discussion or findings of the three statements originally made on the Appeal application discussed above. The Board concurred with the applicant's wishes.

Mr. Frank moved to close the deliberative part of the meeting. Ms. Ashby seconded the motion, and the vote was unanimous.

Public Meeting – Decision:

Mr. Simpson MOVED to DENY the Appeal of the Building Commissioner's action. Mr. Frank seconded the motion.

For all the reasons stated above the Board VOTED unanimously to DENY the applicant's Appeal of the Decision of the Building Commissioner to issue a Notice of Violation and a Cease and Desist Order to Howard Ewert for parking violations at 63-65 North Prospect Street under Section 10.1 of the Zoning Bylaw.

THOMAS SIMPSON

RUSSELL FRANK

JANE ASHBY

FILED THIS _____ day of _____, 2006 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2006.

NOTICE OF DECISION mailed this _____ day of _____, 2006
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2006,
in the Hampshire County Registry of Deeds.